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IN THE

Supreme Court of the United States

October Term, 1965.

No. 986

LOUIS FRIED,

Petitioner,

vs.

BROOKLYN BAR ASSOCIATION,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

LOUIS FRIED,
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THE REPORTER COMPANY, INC., New York, N. Y. 10007—RE 2-6978—1966

(5212)

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Your petitioner, Louis Fried, respectfully prays that a writ of certiorari, directed to the Court of Appeals of the State of New York, be issued to review the final order of said Court of Appeals, entered November 24, 1965, affirming an order of the New York Supreme Court, Appellate Division, Second Department, entered May 10, 1965, without opinion, denying petitioner's application for a writ of error *coram nobis* to declare null and void an order made by the said Appellate Division on January 10, 1936, during petitioner's imprisonment, for his automatic disbarment, in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The affirmance by the Court of Appeals was also without opinion.

Petitioner moved the Court of Appeals to amend the remittitur, which it did, by adding thereto the following:

"Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that he was denied due process of law in violation of his rights under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that there was no denial of any of the appellant's constitutional rights."

Jurisdiction.

Jurisdiction of the Supreme Court of the United States is invoked herein under Title 28, Section 1257(3), U.S.C., and upon the amended remittitur of the Court of Appeals dated January 6, 1966, which states that a question under the Constitution of the United States was raised by petitioner and necessarily passed upon by the Court.

Question Presented.

Whether denial by the Appellate Division and the Court of Appeals of petitioner's application for the writ of error *coram nobis* as to the order made January 10, 1936, for his automatic disbarment, which was effected without charges and a hearing thereon with confrontation and cross examination of accusing witnesses, deprived petitioner of the property right in his license to practice law, in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, on the ground that it was made in error under then Section 88(3) of the New York Judiciary Law, which limited jurisdiction in the Appellate Division so to do, exclusively as to attorneys convicted of a "felony," whereas (as has been conceded by the respondent herein and decisions of the New York Court of Appeals) petitioner was never convicted of a felony within the meaning of aforesaid Section 88(3).

Reports Below.

The case in the Appellate Division of the New York Supreme Court, Second Department, is reported in 23 A. D. 2d 863, without opinion.

The decision of the New York Court of Appeals is reported in 16 N. Y. 2d 1014, without opinion.

Statement.

Petitioner is a citizen of the United States by reason of birth at New York, New York, on August 9, 1895. After about two years service during WW I in the U. S. Army, he was honorably discharged in January, 1919, as Sergeant First Class, Engineer Corps. He then completed his law study at and received his LLB degree from Georgetown University, Washington, D. C., in June, 1921. By profession he was a lawyer, having been admitted to the Bars of the Supreme Court and the Court of Appeals of the District of Columbia in October, 1921; the Supreme Court of the United States in March, 1926; and the Supreme Court of the State of New York in December, 1927.

In August, 1925, after practicing law in Washington, D. C., since 1921, he was appointed in the Federal Civil Service as United States Naturalization Examiner at New York City, serving in that position until he resigned with honor, in September, 1932, to engage in law practice at Brooklyn, N. Y.

In November, 1935, upon his plea of "not guilty," he was convicted in the U. S. District Court, Eastern District of New York, of an alleged violation of 8 U.S.C. 414, which denominated it as a federal felony to assist a person not entitled thereto to apply for a declaration of intention to become a citizen. The sentence was three years, but this was later vacated and a sentence of 47 days substituted.

Upon written confessions of the prosecuting witnesses to the prosecutor, admitting that petitioner's conviction resulted from their perjured testimony, petitioner received a "full and unconditional" Presidential pardon. In 1941, upon an investigation of the evidence of his wrongful conviction as aforesaid, he was reinstated in the Federal Civil Service and was assigned to the U. S. Veterans Administration, where he held the legal position of adjudicator of veterans' claims, until his retirement in 1959, with honor and distinction, at age 63.

The jurisdiction of the Appellate Division of the New York Supreme Court, to automatically disbar an attorney without charges, a hearing thereon and confrontation and cross examination of accusing witnesses, is, by statute, limited exclusively as to attorneys convicted of a felony, within the meaning of the statute (Judiciary Law, Section 90[4], formerly Section 88 [3]). Petitioner was never so convicted.

Upon petitioner's aforesaid federal conviction (which is not a felony under New York law, as will be seen herein), the respondent, in December, 1935, moved the Appellate Division for petitioner's automatic disbarment, in error as for a "felony" under New York law, without charges and a hearing thereon before the Appellate Division, as required by statute as to non-felony convictions. This error the respondent later admitted in its memorandum dated September 8, 1959, the pertinent portion of which reads:

> "* * * The original charges against Fried have never been heard by the Appellate Division * * * the fact that the motion papers (not charges) were served on him while he was in prison, plus the fact that when they were served it was generally thought that conviction of a federal felony automatically resulted in disbarment, may have made his opportunity to be heard more theoretical than real * * *

particularly in view of his claimed innocence, the recantations of the prosecution witnesses, his pardon, his reinstatement (*sic* in the Federal Civil Service) * * * It would seem just that Fried have his day in court."

As to the verity of petitioner's "not guilty" plea, this was established by written confessions of the prosecuting witnesses given to the prosecutor as aforesaid, and thereafter attested to by the respondent in 1961, at the only hearing ever had in the case upon any other of petitioner's reinstatement applications. This only hearing, however, it must be emphasized, was without accord to petitioner of confrontation and cross examination of any accusing witnesses. Significantly though, upon this application in 1961, the respondent recommended petitioner's reinstatement to the bar, which however, the Appellate Division denied, in spite of the respondent's strong urging to do so, in these words:

"* * * It would seem from the retractions and from the presidential pardon, coupled with the thorough investigation incidental to any pardon, that this petitioner was convicted on perjured testimony and never did commit the crime for which he was ultimately disbarred. * * * His behavior from the time he was released from prison fortified his true character—going to work for W.P.A., and then for a bank, and then back into the Federal Civil Service until he reached the age of retirement. His behavior during the war * * * the excellent character testimony adduced on his behalf by the men who worked with him or knew him socially, all individuals of the highest quality—serve as a glowing tribute to the high type of character the petitioner possesses. * * * Moreover, petitioner was revered by the men who worked with him and under him in administering the affairs of the Veterans Bureau. Some of the character witnesses who worked with him for many years bespoke Fried's goodness with emotion which cannot be gleaned from the printed word. In view of

> the foregoing, it is respectfully submitted that petitioner has demonstrated a degree of fitness which strongly recommends itself to a favorable finding for his reinstatement to the bar."

Now, as will appear below, the crime of which petitioner was convicted, even if he were guilty thereof, was not at all cognizable as a "felony" under New York law. In this circumstance, the New York Courts have repeatedly held that aforesaid Section 88(3), Judiciary Law, had no application whatever, and therefore, automatic disbarment was not authorized thereunder. (*Matter of Donegan,* 282 N. Y. 285; *Matter of Koven,* 282 N. Y. 646; *Matter of Ackerson,* 289 N. Y. 844; *Garsson v. Wallin,* aff'd 304 N. Y. 702.)

In the leading case of *Donegan, supra,* the Court of Appeals stated:

> "* * * in 1933, applicant was convicted in the U. S. District Court * * * of the crime of consiracy to use the mails to defraud. * * * pardon has been denied by the President * * * Under the laws of New York, however, * * * conspiracy to commit a crime is only a misdemeanor * * * the Appellate Division has stricken the name of appellant from the roll of attorneys * * * without further hearing, upon the ground that it is so constrained to do by subdivision 3 of Section 88 of the Judiciary Law * * * We are not concerned with the merits. The question presented is solely whether the term 'felony' as employed in the above sections of the Judiciary Law, providing for summary, permanent disbarment, includes an offense defined as a felony by Federal statute, which, if cognizable under the laws of New York, would at most be a misdemeanor * * * Hence the statute must be interpreted in the light of the fundamental canon that penal statutes must be strictly construed. * * * Strict construction of Section 88(3) and Section 477 of the Judiciary Law requires that the term 'felony' include only those Federal fel-

onies which are also felonies under the laws of this state, and exclude such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all.' * * * The order of the Appellate Division should be reversed."

Since his disbarment, petitioner has made about five reinstatement applications. All these, however, were based exclusively upon his pardon and continuous excellent character since 1935, and not upon the Constitutional question raised by him for the first time in the application for the *coram nobis* writ, which is the subject of this appeal. Said applications, therefore, did not constitute a waiver of any Constitutional rights asserted herein; nor did his failure to appeal the jurisdictionally null and void order of January 10, 1936, lend it any validity at any time; nor did it waive his entitlement to the writ of error *coram nobis* as to said admittedly null and void order, as the following authorities clearly hold:

People v. Richetti, 302 N. Y. 290:

"* * * Fundamental concepts of due process, decisions of the United States Supreme Court and of our Court, and the very nature of the *coram nobis* type of relief—all demand trial of such sworn assertions * * *. Defendant has been denied his day in court, and we must see that he has it, be he right or wrong, truthful or lying, good citizen or bad * * * there is no time limit on such applications."

People v. McCullough, 300 N. Y. 107:

"* * * A motion in the nature of a writ of error *coram nobis* is the proper remedy in this state to set aside a judgment obtained in violation of such constitutional right."

Bojinoff v. People, 299 N. Y. 145:

"* * * This does not prevent us from holding as a matter of state law that the defendant may at any time by writ of *coram nobis,* attack the validity of

a judgment of conviction that has been obtained contrary to statute and in violation of the protection afforded by the State and Federal Constitutions."

Hughes v. Cuming, 165 N. Y. 91:

"* * * one is not bound to appeal from a void order or judgment, but may resist it and assert its invalidity at all times. '*Kamp v. Kamp,*' 59 N. Y. 212."

Corpus Juris Secundum, Vol. 49, Section 451, page 882:

"* * * the validity of a judgment is to be determined as of the date of its rendition, and if void then, it remains so forever."

Confrontation.

The invalidity of the order for petitioner's automatic disbarment, because made in violation of the Due Process Clause of the Constitution as aforesaid, is best exemplified in the decision rendered by the Supreme Court of the United States in *Willner v. Committee on Character and Fitness,* 373 U. S. 96, wherein the Court stated, at pages 102, 103:

"* * * the requirements of procedural due process must be met before a state can exclude a person from practicing law. * * * We are not here concerned with grounds which justify denial of a license to practice law, but only with what procedural process requires if the license is to be withheld. * * * We have emphasized in recent years that procedural due process often requires confrontation and cross examination of those whose word deprives a person of his livelihood."

Significantly, the Appellate Division's denial of petitioner's *coram nobis* writ, was without opinion. In refraining from an opinion, it conceded, inferentially at least, that petitioner's conviction was not a felony within

the meaning of said statute (Section 88[3], Judiciary Law). If it believed otherwise, it would have indicated so in an opinion stating that the question of the "federal felony" as involved in the legally controlling *Donegan* case, *supra,* was not parallel to the "federal felony" in petitioner's case. But of course, had it done so, it would have been in error and totally contradictory of the law established in the *Donegan* and companion cases cited herein. Likewise, the foregoing holds true for the denial, without opinion, by the Court of Appeals, which affirmed the Appellate Division. It can only be surmised that both courts failed to signify a reason for their respective denials of the *coram nobis* writ, because they believed that other "merits" in the case justified such denial. Any other "merits," of course, were of no consequence and superceded by the prevailing law, as the Court of Appeals clearly stated in the *Donegan* case, in these words:

> "We are not concerned with the merits"

and as the Supreme Court of the United States clearly stated in the *Willner* case, in these words:

> "We are not here concerned with the grounds which justify denial of a license to practice law."

Conclusion.

During petitioner's helpless imprisonment for a crime which he never committed, he was automatically and illegally disbarred as aforesaid, while as the respondent itself has admitted

> "his opportunity to be heard was more theoretical than real."

The economic disadvantage for adequate employment by reason of his unjust conviction did not ease petitioner's burden in his efforts at exoneration, while at the same time struggling to provide the necessities for his wife,

two children and self. However, with the aid of his wife, who then obtained employment herself, they together were able to send their children to college, marry off their daughter and have their son become a surgeon dentist. With all this, petitioner, in what spare time he had during employment, obtained confessions from his prosecuting witnesses, a full and unconditional presidential pardon, and his reinstatement in the Federal Civil Service. And now, he still continues his fight in this, the last step in his total exoneration, which in some measure can mitigate against the indignity suffered by his family and self for over a quarter of a century by his wrongful conviction, imprisonment and disbarment. Accordingly, he prays this Court's kind consideration of this application for certiorari.

It is respectfully submitted that the writ of certiorari to the Court of Appeals of the State of New York should be granted.

Dated, January 28, 1966.

Respectfully submitted,

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